IN THE

Supreme Court of the United States

October Term, 1979

DOCKET NO. 78-1290

ARTHUR GOLDSTEIN,
Petitioner.

v.

CITY OF NORFOLK,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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SUBJECT INDEX

TABLE OF CITATIONS

Cases

Constitutional Provisions

Statutes

Ordinances

PERTINENT PROVISIONS OF THE UNITED STATES CONSTITUTION, STATUTES OF VIRGINIA AND ORDINANCES OF THE CITY OF NORFOLK

The respondent adopts petitioner's statement of the pertinent provisions, except that it adds the following thereto:

Section 1-3 of The Code of the City of Norfolk, Virginia, 1958, as amended:

Sec. 1-3. Separability.

> If any part or parts, section or subsection, sentence, clause or phrase of this Code is for any reason declared to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this Code.

QUESTIONS PRESENTED

I. Do the requirements of Ballew v. Georgia apply retroactively to a case in which the jury was impaneled, and its verdict of conviction rendered, five months prior to March 21, 1978?

II. Does the Norfolk obscenity ordinance violate the Equal Protection Clause

of the Fourteenth Amendment to the United States Constitution?

III. Does trial by an all-woman jury, impartially and lawfully selected, violate a defendant's constitutional rights?

STATEMENT AS TO APPENDIX

References herein are keyed to petitioner's Supplemental Appendix.

STATEMENT OF THE CASE

Petitioner Goldstein, owner of a bookstore at 311 Granby Street, Norfolk, Virginia, sold the magazine "Look" to Leroy Lynch on June 2, 1977. Goldstein was indicted on a charge of knowingly and unlawfully selling an obscene item in violation of Section 31-86 of The Code of the City of Norfolk, Virginia, 1958, as amended. He was subsequently tried by a jury over his objection (Trial Order-First Day, A. 2) and convicted (Trial Order-Second Day, A. 3). The trial was held

October 20 and 21, 1977, in the Circuit Court of the City of Norfolk, Virginia. Due to briefing, argument and consideration of various defense motions, petitioner was not sentenced until April 4, 1978, when the jury sentence of six months' confinement and a one thousand dollar fine was adopted by the Court (Misdemeanor Sentencing Order, A. 14, 15).

At the trial, a five-person jury was selected from a venire of eleven, chosen according to procedures set forth in the appropriate State statutes. The prosecution and defe se each alternately struck three from the panel. The remaining five jurors were duly sworn to try the case. (Trial Order-First Day, A. 2, 3.) Defense counsel objected to the jury selection process because it had produced a jury composed solely of women. No objection was made at trial to the number of jurors composing the jury (Letter Opinion of John W. Winston, Judge,

A. 13). This objection to the five-person jury was first raised by motion filed March 24, 1978 (A. 13). This motion was denied on March 27, 1978 (A. 13).

Goldstein's Petition for Appeal to the Supreme Court of Virginia was refused on November 20, 1978 (A. 17), and execution of the judgment was stayed until February 18, 1979 (A. 18, 19), to permit him to docket his case in this Court.

I. IT IS NOT APPROPRIATE TO APPLY BALLEW v. GEORGIA RETROACTIVELY IN THIS CASE.

At petitioner's jury trial held on October 20 and 21, 1977, he did not object to the selection of a jury comprised only of five persons. Only prior to sentencing on March 24, 1978, five months later, did he move the Court to set aside the jury verdict, relying on Ballew v. Georgia, 435 U.S. 223, (March 21, 1978). Petitioner's motion and objection to the number of persons

on the jury was not timely made since it came for the first time after the verdict was rendered. Rule 5:21 of the Rules of the Supreme Court of Virginia. Since timely objection was not made as required by Rule 5:21, his objection may not be entertained on appeal. Horner v. Holt, 187 Va. 715, 47 S.E.2d 365 (1948).

The rule in Ballew, requiring at least six-person juries in non-felony trials is not to be applied retroactively to convictions obtained by juries impaneled prior to March 21, 1978. Destefano v. Woods, 392 U.S. 631 (1968); Taylor v. Louisiana, 419 U.S. 522 (1975); Daniel v. Louisiana, 420 U.S. 31 (1975).

In Destefano, this Court held that the constitutional principles announced in Duncan v. Louisiana, 391 U.S. 145 (1968) and Bloom v. Illinois, 391 U.S. 194 (1968) were entitled to prospective application only, so as to be inapplicable to trials

begun prior to May 20, 1968, the date both Duncan and Bloom were decided. Duncan held that the due process clause of the Fourteenth Amendment guaranteed a right of jury trial in all state criminal cases which, were they tried in a Federal court, would be within the Sixth Amendment's guaranty of trial by jury. Bloom held that the due process clause of the Fourteenth Amendment required the states to provide jury trials in prosecutions for serious criminal contempts.

Destefano, citing Stovall v. Denno, 388 U.S. 293 (1967), set forth factors to be considered in determining whether a particular case should be applied only prospectively:

> (a) the purpose to be served by the new standards,
>
> (b) the effect of the reliance by law enforcement on the old standards, and

> (c) the effect on the administration of justice of a retroactive application of the new standard. Destefano, at 633.

Destefano reasoned that the purpose and values implemented by the right to jury trial could not be served by requiring retrial of all persons convicted in the past who were denied a jury. Not every criminal trial tried before a judge is unfair. Similarly, not every criminal verdict rendered by a five-person jury was rendered unfairly, nor every defendant in such a case arbitrarily dealt with.

Additionally, Destefano cautioned that the effect of a holding of general retroactivity on law enforcement and administration of justice would be significant. The same consideration weighs against the retroactive application of Ballew. To retry every defendant convicted by a five-person jury would place an onerous burden upon Virginia

and its municipalities.

Further, a ruling applying Ballew retroactively would create confusion and chaos in the law. The right to a jury trial and the right to a six-person jury are so interrelated that once the Supreme Court held that Duncan was prospective only, then the same holding for Ballew must follow. Otherwise, an untenable situation arises: Only those defendants tried by a five-person jury would receive new trials, while in other states defendants who were denied trial by jury altogether would not be entitled to a new trial.

Daniel v. Louisiana, 420 U.S. 31 (1975) and Taylor v. Louisiana, 419 U.S. 522 (1975), when taken together, are directly pertinent to the present situation. Taylor held that the exclusion of women from jury venires deprived a criminal defendant of his Sixth and Fourteenth Amendment right to trial by an impartial jury drawn from a fair cross

section of the community. This case was decided January 21, 1975.

In Daniel, a male defendant was convicted on November 20, 1973, of armed robbery by a jury which had been selected by a venire chosen in accord with Louisiana law under which a woman could not be called for jury service unless she previously filed a written declaration of her desire to be subject to jury service. The defendant, contending that the jury selection procedure violated the Fourteenth Amendment because women were systematically excluded from the venire, made a timely motion to quash the venire. The motion to quash was denied, and the Louisiana Supreme Court affirmed. This Court also affirmed and held that although the jury venire from which the defendant's jury was chosen did not constitute a fair cross section of the community, the decision in Taylor was not to be applied retroactively to convictions which

were obtained by juries impaneled prior to the date of the Taylor decision--January 21, 1975.

The situation presented to the Court in Daniel and Taylor parallels Ballew and the instant case. Just as Daniel denied any retroactive application of Taylor to juries impaneled prior to the date of the Taylor decision, Ballew must not be retroactively applied to juries impaneled prior to March 21, 1978.

II. NORFOLK CITY OBSCENITY ORDINANCES DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Statutes identical to the attacked Norfolk City Code §§31-86, 31-87 and 31-94 have been upheld as not violative of the Equal Protection Clause in several decisions. A case directly on point, State v. J. R. Distributors, Inc., 82 Wash.2d 584, 512 P.2d 1049, cert. den. 418 U.S. 954, 41 L.Ed.2d 1166, 94 S.Ct. 3217 (1974) involving

substantially identical legislation and issues, held that the Equal Protection Clause was not violated. That Court recognized that if any state of facts reasonably could be conceived that would sustain the statutory classification, then there was a presumption that those facts existed.[1] Further, the burden is upon one who challenges the classification of showing that it fails to rest upon any reasonable basis and is essentially arbitrary. The Court stated that:

> There are valid reasons for the classification. The following are by no means exclusive: (1) Book and magazine stores offer a wide range of materials from which both the customer and clerk may select at the time of sale. Each has an opportunity to choose that which will be sold or purchased. On the other hand, motion pictures are shown one reel at a time and the projectionist must

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[1]For further Virginia authority for this principle see: Mandell v. Haddon, 202 Va. 979 (1961).

> exhibit those selected by the manager. (2) Projectionists do not decide which films to exhibit and, thus, should not be obliged to make a judgment as to their obscenity. Furthermore, to require a projectionist to decide whether the showing of a particular film would be a crime might tend to "chill" the dissemination of borderline, but constitutionally protected motion pictures. Id., at 1061, 1062.

Finally, in discussing exemption from prosecution allowed libraries, museums and universities which are publicly supported, the Court stated that pornographic materials may be allowed to be shelved in these educationally oriented institutions as examples of obscenity.

The Supreme Court of California, when confronted with this issue, has consistently upheld similar legislation as being based upon a reasonable classification. In ruling upon a California statute identical to ordinances in the instant case that Court in People v. Kuhns, 61 Cal. App.3d 760,

132 Cal. Rptr. 725 (1976) stated that:

> We hold...that the exemption of projectionists is valid and does not violate the equal protection clause because it tends to promote rather than inhibit dissemination of speech as protected by the First Amendment which constitutes a compelling state interest justifying the classification. Id., 132 Cal. Rptr. at 739.

The California Supreme Court has ruled precisely the same way when confronted with this very issue on two other occasions. See: Gould v. People, 56 Cal. App.3d 923, 128 Cal. Rptr. 743 (1976) and People v. Haskins, 55 Cal. App.3d 242, 127 Cal. Rptr. 426 (1976).

Other rational bases for dissimilar treatment of certain theatre employees, as opposed to bookstore employees, were set forth by Chief Justice Murphy in his dissenting opinion in Wheeler v. Maryland, 380 A.2d 1052 (1977). In a motion picture theatre the necessity for employees

to have contact with a film is minimal. Even the contact of a projectionist is limited. However, a seller of books and magazines can hardly make a sale without in some manner coming into physical contact with the item sold. Furthermore, while controls may be placed so as to regulate the age of all who enter the theatre to see a film, no such controls are present when obscene materials, such as a magazine, are once removed from the seller's premises. It is unlikely that a film will be transported from a theatre so as to become available for viewing by juveniles.

Assuming arguendo that the exceptions in §§31-87 and 31-94 are violative of the Equal Protection Clause, the section under which petitioner was convicted (§31-86) is severable pursuant to §1-3 of the Norfolk City Code, which provides that:

> If any part or parts, section or subsection, sentence, clause or phrase of this Code is for any reason declared to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portions of this Code. §1-3, Norfolk City Code, 1958, as amended.

Please note that petitioner relies on Wheeler, supra, in which the Code of the State of Maryland had no separability statute. Wheeler may thus be distinguished on the applicable law.

The Virginia Supreme Court has recognized as axiomatic that a statute may be valid in one part and invalid in another; and if the invalid is severable from the remainder, then that invalid part may be ignored, if after such elimination the remaining portions are sufficient to accomplish their purpose in accordance with the legislative intent. Only if the void portion is the inducement to the passage of the act, or is so interwoven in its texture as to prevent the statute from becoming operative in accordance with the will of

the legislative body, is the whole statute invalid. Allen v. Norfolk, 169 Va. 177 (1955); New v. Atlantic Greyhound Corp., 186 Va. 726 (1947).

As the Court stated in Board of Supvrs. v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975), where a severability provision is present, a legislative act is presumed to be severable. The burden of proving the non-severability is on the assailant of the legislation. This presumption of severability must be overcome only by considerations which establish the clear probability that the legislature would not have been satisfied with what remains after elimination of the invalid parts.

III. A JURY OF FIVE (5) WOMEN IMPARTIALLY AND LAWFULLY SELECTED DOES NOT CONSTITUTE A VIOLATION OF THE DEFENDANT'S CONSTITUTIONAL RIGHTS.

The jury in the instant case was selected from a panel as provided by law, in

compliance with the Code of Virginia. See: §19.2-262, Code of Virginia, 1950, as amended. The petitioner cannot later complain that the jury selected did not include any men. As the Supreme Court of Virginia has stated:

> All that the defendant was entitled to was a speedy trial by an impartial jury of his vicinage. Section 8, Constitution. He has no constitutional right to friends on the jury, or to a proportional representation of sex thereon. Jurors should be selected on the basis of individual qualifications and not on the basis of sex or race. The burden of proving a purposeful and intentional discrimination was on the defendant and this he wholly failed to show. (Citing authority.) Near v. Commonwealth, 202 Va. 20, 116 S.E.2d 85 (1960), cert. denied 365 U.S. 873, 81 S.Ct. 907, 5 L.Ed.2d 862 (1961), cert. denied 369 U.S. 862, 82 S.Ct. 951, 8 L.Ed.2d 19 (1962). (Emphasis supplied.)

In the instant case there has been no showing of a purposeful or intentional discrimination on the basis of sex. Indeed, from a panel of eleven (11) persons, the petitioner himself utilized his pre-emptory challenges to strike three (3) men from the

panel. It is utterly without merit for him to later claim prejudice because this resulted in a jury of five (5) women.

The Goldstein jury, as any other jury, lawfully and impartially selected, represented a cross section of the community. As such, it was as able as any other lawfully selected jury to determine contemporary community standards.

CONCLUSION

Ballew v. Georgia, supra, should not be applied retroactively in the instant case because:

1. Petitioner failed to make timely objection to the number of persons on the jury, thereby waiving his right to raise the issue on appeal;

2. This Court's own prior decisions are controlling and require non-retroactive application; and

3. Retroactive application would create confusion and chaos in the law.

The City of Norfolk's obscenity ordinances do not violate the Equal Protection Clause because:

1. The Court below gave full consideration to this issue and decided it correctly on the law; and

2. The decision relied upon by petitioner is distinguishable on the law, in that the Norfolk City Code contains a severability clause while there was none in Wheeler v. Maryland, supra.

The all woman jury which was impartially and lawfully selected did not constitute a violation of petitoner's constitutional rights. As a matter of law, a defendant has no right to a proportional representation of sex on a jury. Petitioner himself

struck three (3) men from the jury panel.

For these reasons, the respondent respectfully urges that the Petition for a Writ of Certiorari be denied and that petitioner's conviction be affirmed.

Respectfully submitted,

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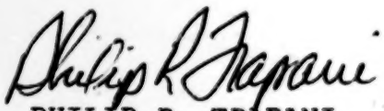
CERTIFICATE OF SERVICE

I hereby certify that I have served three (3) copies of this Brief in Opposition to Petition for a Writ of Certiorari upon counsel of record for the petitioner, Paul M. Lipkin and Samuel Goldblatt, Goldblatt, Lipkin, Cohen, Anderson & Jenkins, a professional corporation, 804 Plaza One Building, Norfolk, Virginia, 23510, pursuant to the requirements of Rule 33 of the Rules

of the Supreme Court of the United States, by depositing same in a United States mail box, with first class postage prepaid, addressed to counsel of record for the petitioner as set forth above, on or before March 16, 1979.

I further certify that I am a member of the bar of this Court, and that all parties required to be served have been served on or before March 16, 1979.



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